AUG 25 1995

No. 94-2135

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CITY OF MORGAN CITY,
Petitioner,
v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE COLORADO ASSOCIATION OF MUNICIPAL UTILITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 37 of the rules of this Court, amicus curiae Colorado Association of Municipal Utilities (CAMU) requests leave to file the accompanying Brief as amicus curiae in support of the Petition for a Writ of Certiorari. Counsel for Petitioner and for Respondent the United States of America have consented to the filing of this Brief; however, counsel for Respondents South

Louisiana Electric Cooperative Association and Cajun Electric Power Cooperative, Inc. have declined consent.

CAMU is a nonprofit membership association composed of municipally-owned electric systems and power authorities. The members of CAMU provide retail electric service to over 560,000 Colorado residents.

CAMU and its members have a substantial interest in the issues involving whether the Rural Electrification Act preempts state statutes which would otherwise allow municipal utilities to provide electric utility service to municipal residents in annexed areas previously served by Rural Electrification Act loan recipients. CAMU supports the issuance of a writ of certiorari, and through the accompanying Brief seeks to inform the Court of the importance of the issues raised by the Petitioner and the manner in which the federal purpose preemption principles adopted by the Fifth Circuit are being applied by the Federal District Court for the Eastern District of Oklahoma.

For the foregoing reasons, the Motion of CAMU to file the accompanying brief as amicus curiae in support of the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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BRIEF OF THE COLORADO ASSOCIATION OF MUNICIPAL UTILITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Amicus curiae Colorado Association of Municipal Utilities (CAMU) respectfully supports the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, dated September 12, 1994, as supplemented by an opinion on rehearing, dated April 3, 1995.

INTEREST OF THE AMICUS CURIAE

CAMU is a non-profit membership organization composed of 29 municipal electric utilities and three municipally-owned power authorities operating within the State of Colorado. CAMU members supply retail electric power to over 560,000 citizens of Colorado. Each of the CAMU member municipalities provides electric service to areas which border upon the service territory of rural electric cooperatives. On information and belief, all of the rural electric cooperatives in Colorado have loans outstanding with Rural Utilities Service, the successor organization to the Rural Electrification Administration.

Occasionally CAMU members annex areas receiving electric service from rural electric cooperatives. The Colorado Constitution recognizes the right of a municipal utility to provide service to municipal residents. Accordingly, the Colorado General Assembly enacted specific statutes to address the situation of an annexation of rural electric cooperative service territory. Under these statutes, when such an annexation occurs the municipal utility may exercise its powers of eminent domain in order to replace the rural electric cooperative and become the exclusive provider of electric service in the annexed area. However, in order to exercise that option, the municipality must pay just compensation to the rural electric cooperative for its facilities, service rights and reintegration costs. These Colorado statutes, in providing a mechanism for the realignment of service territories, recognize the conjunctive rights of the municipality to provide utility service to its citizens and the municipal citizens' rights to take service from the utility they own.

Under the ruling of the Fifth Circuit, these statutes could be preempted and Colorado municipalities could lose their right under the Colorado Constitution to provide utility service to their citizens if a federal agency, the Rural Utilities Service, refuses to permit the condemnation.

Municipalities could lose this right even though they are paying just compensation to the rural electric cooperative. This result not only denies the municipal citizens access to lower-cost municipal utility service, but it also denies the municipal utility the ability to expand its service base as the municipality grows.

REASONS FOR ISSUING THE WRIT

CAMU respectfully suggests that the City of Morgan City has stated sufficient grounds for the issuance of a writ of certiorari. CAMU further suggests that review is desirable in light of the manner in which the Fifth Circuit's ruling has been applied by other federal courts.

In dissenting from the Fifth Circuit's denial of rehearing *en banc,* the dissenting circuit judges characterized the *City of Morgan City* decision as "a breathtaking federal power-grab by REA from local government units that otherwise enjoy broad eminent domain authority." 49 F.3d at 1076. The breadth of this "power-grab" is expanding beyond even what the dissenting circuit judges feared. A recent decision by the Federal District Court for the Eastern District of Oklahoma extended the federal purpose preemption doctrine relied upon by the Fifth Circuit to preempt a municipality's right to condemn the facilities of a rural electric cooperative *even when the Rural Utilities Service did not oppose the condemnation. City of Stilwell v. Ozarks Rural Elec. Coop. Corp.,* 870 F. Supp. 1025, 1026 (E.D.OK 1994), *appeal pending.* Now, under *City of Stilwell,* in addition to the Rural Utilities Service any rural electric cooperative with outstanding federal loans can thwart what previously had been characterized as a municipality's "broad eminent domain authority."

The broad federal purpose preemption ascribed to the Rural Electrification Act by the Fifth Circuit, if left intact, will jeopardize or eliminate long-standing state

and local prerogatives, including: a municipality's right to condemn rural electric cooperative facilities; a municipality's right to provide utility service to its residents; and the ability of states and local governments to redefine the service territory of retail public utilities.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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